Supreme Court, U. S.
FILED
MAR 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1367

UNITED STATES OF AMERICA,
Respondent,

—v.—

BERNARD SCHIFTER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THEODORE ROSENBERG,
Attorney for Petitioner
Bernard Schifter,
125 Schermerhorn Street,
Brooklyn, New York 11201.
Telephone: 858-0589

Of Counsel
HERBERT J. KIMMEL

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	2
Summary	4
Reason for Granting Certiorari	6
I.—The Petitioner Was Denied A Fair Trial When The Court Omitted To Instruct The Jury That Since *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975) The Jury Should Consider Coercion And Duress In Determining Whether Petitioner's Statements Given To The Police Were Voluntary	6
II.—The Weight Of The Credible Evidence Clearly Reflects An Omission To Timely Present The Miranda Warnings	11
III.—The Arrest Of The Petitioner, Schifter, And The Search And Seizure Of The Merchandise In The Station Wagon Was Without Probable Cause	21
CONCLUSION	24
Appendix A—Order Affirming Judgment	1a

TABLE OF CASES

PAGE

Jackson v. *Denno*, 378 U.S. 368 (1964) 10

United States v. *Barry*, 518 F.2d 342 (2d Cir. 1975) 5, 6, 8, 9, 10

United States v. *Birnbaum*, 373 F.2d 250 (2d Cir. 1967) 10

United States v. *Inman*, 352 F.2d 954 (4th Cir. 1965) 9, 10

United States v. *Marshall*, 488 F.2d 1169 (9th Cir. 1974) 20

Whiteley v. *Warden*, 401 U.S. 560 (1971) 24

Statutes:

28 U.S.C. Section 1254(i) 1

18 U.S.C. Section 3501 2

BLEED THROUGH

IN THE

Supreme Court of the United States

October Term, 1975

No.

UNITED STATES OF AMERICA,

Respondent,

—v.—

BERNARD SCHIFTER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Bernard Schifter respectfully moves this Court to issue a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Second Circuit entered on February 26th, 1976.

Opinions Below

There were no opinion rendered in the courts below. The order affirming the judgment of the United States District Court for the Eastern District of New York appears at Appendix A, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 26th, 1976. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(i).

Questions Presented

1. Whether, petitioner was denied due process of law when the Court omitted to instruct the jury that they, the jury, should consider coercion and duress in determining whether petitioners incriminating statements given to Government agents were voluntarily obtained?

2. Whether, the weight of the credible evidence clearly reflects an omission to timely present the *Miranda* warnings?

3. Whether, the arrest of the petitioner, Schifter and the seizure of the property in petitioner's station wagon was without probable cause and in violation of petitioner's constitutional rights?

Statutory Provisions Involved

18 U.S.C. Section 3501 admissibility of confessions provides:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the

BLEED THROUGH

circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in

this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Added Pub.L. 90-351, Title II, § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub.L. 90-578, Title III, § 301(a) (3), Oct. 17, 1968, 82 Stat. 1115.

Summary

This case may be summarized as follows: Bernard Schifter allegedly negotiated a sale of camera lenses stolen at Kennedy Airport to an undercover agent, a New York City Detective named Joseph Giordano. The transaction took place within the defendant's Service Station located in Brooklyn, New York. Agent Giordano was wired with a transmitter. Federal agents were located nearby recording the conversation between Agent Giordano and Schifter. A signal was given after Agent Giordano passed $1,000 to Bernard Schifter for the camera lenses and the defendant was thereupon arrested. It is contended under our Points that at the juncture of arrest and the seizure of the evidence there was no probable cause.

BLEED THROUGH

We further contend that appropriate *Miranda* warnings were not proffered. Inasmuch as it was necessary to extensively treat the facts under our Point, *infra*, they are not exhaustively treated here to avoid unnecessary repetition.

At the time of the petitioner Bernard Schifter's trial defense counsel was not aware of *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975). However, on December 5, 1975, in a motion for a new trial the specific issue as stated above and throughout this Point was brought to the Court's attention.

Notwithstanding, being alerted to the omission in the charge that since *Barry, supra*, the jury should be told that coercion and duress is part of their determination in considering whether the statements by Schifter to the Government agents were voluntary. The Court denied the motion for a new trial.

Most relevant in the record is the following at p. 32 of December 5, 1975 motion for a new trial:

> "Mr. Rosenberg: There is a specific text under 3501.
>
> The Court: It doesn't require me to do more."

Then at pp. 40-41 of the same proceedings the following was said:

> "Mr. Rosenberg: Thank you your Honor. I appreciate it, Judge. I wanted to get one thing clear for the record. I want to understand it. It is the Court's determination by its instruction to the jury that the jury was able to be cautioned as mandated by 3501 within the *Barry*.
>
> The Court: I would certainly think so.
>
> Mr. Rosenberg: You would think so.

The Court: Yes. I wouldn't have, I wouldn't have given the instruction that fully if I didn't.

Mr. Rosenberg: This was my argument. I don't think the jury had gotten it. * * * "

Reason for Granting Certiorari

I.

The Petitioner Was Denied A Fair Trial When The Court Omitted To Instruct The Jury That Since *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975) The Jury Should Consider Coercion And Duress In Determining Whether Petitioner's Statements Given To The Police Were Voluntary.

Petitioner's Statements Considered:

By virtue of a pre-arranged signal three automobiles with agents converged upon the defendant at the time of his arrest. At this point the defendant was with undercover Agent Giordano. Agents Thornton and Maxwell testified that within moments they gave full "*Miranda*" warnings to the defendant—and the defendant had nodded his head. The totality of the circumstances surrounding petitioner's arrest clearly demonstrates that the purported "*Miranda*" warnings, if proffered, were proffered in an atmosphere of confusion and oblique, if not patent coercion. Certainly the element of coercion was sufficiently pervasive as to require the Court to instruct the jury that in determining the weight to be given to the asserted inculpatory admissions of the defendant the jury should consider the fact if the inculpatory admissions were the product of coercion and duress. This the record reflects the Trial Court did not, *Sua Sponte*, do in its instructions to the jury.

BLEED THROUGH

The unmistakable intent of Congress in the enactment of Title 18, U.S.C. Section 3501, was to provide adequate protection against the use of coerced confessions and a desire that the jury play a major roll in weighing the evidence of duress. This purpose would be subverted if, even in the absence of a proper objection, the jury were not specifically instructed as to the precise nature of its role.

In its instructions to the jury, relevant to incriminating statements attributed to the petitioner, the Court stated at p. 346 of the record:

> "Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of Court, and after a crime has been committed, *should always be considered with caution and weighed with great care;* and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.
>
> A statement or act or omission is 'knowingly' made or done, if done voluntarily or intentionally and not because of mistake or accident or other innocent reason." (Emphasis ours.)

Then at pages 346-347, the Court more or less gives the jury an outline as indicated in Section 3501(b).

In conclusion at pages 347-348 of the record the Court states:

> "If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally, you should disregard it entirely; on the other hand, if the evidence in the case does show beyond a reasonable doubt that an admission was in fact voluntarily and intentionally made by a defendant, you may

> consider it as evidence in the case against the defendant who voluntarily and intentionally made the admission."

The Court informed the jury at page 349 of the record, as follows:

> "After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves."

Then, at page 351, the Court continued:

> "As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence."

This instruction does not comport with Title 18, Section 3501. In *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975) decided June 18, 1975, the Court of Appeals for the Second Circuit reversed a conviction and ordered a new trial because, as in the instant case, the Court failed to comply with 18 U.S.C., Section 3501. In the *Barry* case the instruction found defective is as follows:

> "Of course, it is not only your task and your duty, but it is your exclusive province to determine what the facts in the case are and, in making that determination, to consider and weigh the evidence."

The Court, in *Barry, supra*, in ordering a new trial said:

> "For several reasons we find that this direction falls short of the statutory mandate. Most significantly, section 3501 itself states that the judge 'shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances'. (Emphasis added.) It is plain from this provision that Congress contemplated

> a specific reference to the confession. Indeed, were we to adopt the interpretation suggested by the Government, the entire phrase would become effectively superfluous, since it might be satisfied in any case by the standard boilerplate charge on credibility. But where, as here, such a general charge is not even supplemented by a limiting instruction at the time the evidence is introduced, the jurors are all too apt to conclude that the judge has made a binding determination that the confession was in fact and law voluntary or, perhaps, more serious, true.

The same deficiency found by the Court of Appeals in *Barry, supra*, is present in the instant case. The Court in relation to the defendant's admission in this case nowhere complies with Section 3501(a) which undeniably demands that the Court:

> "Shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

The Court's statement that a confession "should always be considered with caution and weighed with great care" in nowise comports with Section 3501(a).

Apart from the petitioner's acts and conduct the Government relied heavily upon the petitioner's admissions especially to establish jurisdiction.

Thus, the failure to instruct the jury within the contemplation of Section 3501 is plain error that requires a new trial on the authority of *Barry, supra*. See, also, *United States* v. *Inman*, 352 F.2d 954 (4th Cir. 1965).

The Court further failed to instruct the jury in its charge with respect to its earlier ruling at the suppression hearing following:

> "The Court: I find that Thornton gave the defendant an adequate warning when he first apprehended him, and I find that the other warnings, while they certainly helped, that he had been given an adequate warning were unnecessary in light of the first warning." (122)

By omission the Court permitted the jury to speculate that if one agent's alleged Miranda warnings were insufficient then perhaps another agent's was sufficient. At the very least the omission improperly permitted the use of one agent's testimony as a bolstering factor. This is legally impermissible because at the pre-trial hearing the Court chose to limit its findings as to the Miranda warnings exclusively to that of an agent named Thornton. "We must recognize that a Judge's silence may under some circumstances have as much impact as his words." *Barry, supra* at 348; Cf. e.g., *Jackson* v. *Denno*, 378 U.S. 368 (1964).

The totality of the omissions illustrate a "sufficient prejudice to the defendant to justify vitiating the jury's verdict". *United States* v. *Birnbaum*, 373 F.2d 250, 257 (2d Cir. 1967). Inasmuch as the Court below affirmed petitioner's conviction without opinion we may only speculate that the Court declined to invoke the plain error rule since counsel voiced no objection at the trial. However, this Court has repeatedly held that even as here where no objection was voiced reversal is mandated. Cf. e.g., *United States* v. *Inman*, *supra* and cases cited therein.

BLEED THROUGH

II.

The Weight Of The Credible Evidence Clearly Reflects An Omission To Timely Present The Miranda Warnings.

On September 20, 1974, at petitioner Schifter's Service Station, located at 108th Street and Flatlands Avenue, Brooklyn, New York, undercover Agent Joseph Giordano and defendant Schifter were "arrested by Government Agents. Undercover Agent Giordano had secreted upon his person at that time a transmitter which permitted other Government Agents (Kopeski and Grattan) located nearby in an automobile to record the conversation between Schifter and Giordano. In addition, it permitted the recordation of the conversation at the exact moment of arrest.

The Government offered a transcript of the taped conversation(s). We will, insofar as is pertinent to our argument, advert to this transcript below.

Agent Mark Thornton testified that pursuant to a pre-arranged signal he approached the gas station and arrested petitioner Schifter. Petitioner, according to Agent Thornton, was handcuffed and given his Miranda warnings in the following manner:

> "I advised him that he had a right to remain silent, and anything he said could be used against him in a court of law; that if he wanted to consult an attorney before answering any questions he could, if he didn't, if he couldn't afford an attorney, the government would get one for him; if he wanted to stop answering questions at any time, he could." (8-9)*

---

* Unless otherwise indicated, numerals indicate Suppression Hearing and hereafter the letter "T." followed by numerals indicate Trial Proceedings.

According to Agent Thornton, Schifter merely nodded his head (8). Agent Thomas Maxwell was present while Thornton was giving Schifter his Miranda warnings (3); in answer to, if he, Thornton had any conversation with Schifter, Thornton replied that Maxwell asked Schifter where he had obtained the money (the $1,000) and Schifter replied that it was for "gas money" (10).

When confronted with his Grand Jury testimony, Thornton admitted giving this contradictory testimony (T. 268).

> "Answer: Yes, immediately after I approached him and advised him that he was under arrest for a theft of goods, possession of goods stolen from Custom's custody, I asked him to empty his pockets. He had $1,000 in cash among other items and I asked him what he was doing with that money and he said it was gas money."

Agent Thornton testified concerning Maxwell's whereabouts at the time of Schifter's arrest, as follows:

> "Q. Now, as you recall, going back to the time when the arrest was made, you came in and Giordano and the defendant were together, correct? A. Yes.
>
> Q. How long after that would you say Agent Maxwell came in? A. After I came in?
>
> Q. After you came in. A. I would say he was there about the same time.
>
> Q. Well, would you say he was there a minute later? A. No, I wouldn't say that.
>
> Q. Half a minute later? A. About the same time.
>
> Q. Within the same two or three seconds? A. Something like that.
>
> Q. So that Agent Maxwell was privied to everything that was said? A. I don't know that.

Q. At least for the time that he was there? A. Where?

Q. Withdrawn. When you came in, as I understand, you immediately said to the defendant and Giordano, 'You are both under arrest,' is that correct? A. I directed my attention to Mr. Schifter.

Q. Right, the defendant? A. Right.

Q. But Giordano was standing there, is that correct? A. He was, but I think he was separated.

Q. How far away was he? A. I don't know, he was about next to me, I know that.

Q. Five feet, eight feet? A. Perhaps.

Q. Within the area? A. Could have been ten to twenty as far as I know.

Q. You are telling me that when you arrived at the scene you didn't know in point of view of time how far Giordano was away from the defendant? A. When I arrived on the scene he was next to him.

Q. How is that? A. When I arrived on the premises of the gas station he was standing next to the defendant Schifter.

Q. When they were standing next to each other, did you say to both of them, 'You are under arrest'? A. No. I directed my attention to Mr. Schifter.

Q. Are you saying to us, when you arrived on the scene you took Schifter away from where Giordano was standing? A. I said, come over here or words to that effect.

Q. This is before you told him, 'You are under arrest'? A. Perhaps.

Q. You are not certain? A. Perhaps, I don't know which words I said first.

Q. But Maxwell was there then guarding Giordano? A. I don't know where Maxwell was all

the time. I know he was next to me. I don't know if he was next to me all the time.

Q. Then you said to defendant Schifter, 'You are under arrest', and you handcuffed him? A. Yes.

Q. And then Agent Maxwell appeared—that is, he was in the area and he came over to make the search? A. Yes." (T-257-259)

Agent Maxwell had testified that by a prearranged signal he was advised over the radio in his car to move into the gas station. He arrived about twenty to thirty seconds after Thornton (52, 54).

It is noteworthy that Agent Maxwell first testified:

"Q. Were you present when Agent Thornton read the defendant or advised the defendant of his rights? A. I, in addition advised the defendant of his rights; yes.

Q. You were present when—

The Court: He said both of them advised him of his rights.

Q. What I'm trying to get at now, did Agent Thornton advise him of his rights and then you advised him of his rights? A. Yes.

Q. So Agent Thornton first advised him of his rights. A. Yes.

Then, in an amazing turnabout Agent Maxwell testified as follows:

"Q. Did he read him a card? A. I don't recall.

Q. What do you recall Agent Thornton saying to this defendant at the time he was arrested with respect to his rights? A. When he was talking to the defendant I wasn't in a position to overhear him.

Q. Where were you? A. I was coming into the station while Agent Thornton was talking to the defendant.

Q. Didn't you indicate before that you came in about 20 or 30 seconds after that, after Agent Thornton, and nothing was happening? A. Agent Thornton was talking to the defendant about 20, 30 seconds, then I arrived.

Q. So, as I understand it then, you, as you sit there, don't recall Agent Thornton advising him of his rights at all? A. Not Agent Thornton, but I did.

Q. You don't recall that Agent Thornton ever advised him of his rights? A. That's right.

Q. You now tell us you were the one who advised him of his rights? A. Agent Thornton could have.

Q. Did you hear him? A. No.

Q. At any time?

The Court: Don't argue with him. Your statement was he was the only one. He has not so testified. He just never overheard Thornton advise him" (T-57).

Agent Maxwell testified he advised Schifter of his rights at the Service Station. Then a second time in the Government car leaving the Service Station and then a third time at Kennedy Airport, "Building 80" (T-58, 59).

At pages 60-61 of the Record, Maxwell remarkably testified as follows:

"Q. Let's get back to the Gas Station. When you advised him of his rights, who was present? A. I was present and the defendant was present.

Q. What happened to Thornton? A. There were a number of people around the car. The circumstances which I performed a personal search

of Mr. Schifter, I found some money in his right front pocket, I found a wallet in his rear pocket and I knew this was incriminating evidence. I said, 'Before I ask you any questions about this money, I want to make it clear that you understand your rights'.

Q. First you searched him then you advised him of his rights?

The Court: He found cash and what else?

The Witness: Cash, $1,000 in his front right pocket.

Q. Was Agent Thornton present when the search took place? A. Within the immediate area. He wasn't present right there. I was performing the search right with Mr. Schifter, right alongside of the car, he was busy doing other things.

Q. As I understand your testimony, you didn't hear Agent Thornton advise him of his rights. You came 20, 30 seconds, you don't recall whether the defendant was cuffed or not? A. He wasn't cuffed when I performed the personal search.

Q. Then you searched him then you advised him of his rights and Agent Thornton was in the immediate area, but you don't know whether or not he heard it? A. Right."

In respect to advising Schifter of his rights, Agent Maxwell said, at p. 67:

"A. I said you have been arrested for a federal violation. Before I ask you any questions I must advise you of your rights. You have a right to remain silent, anything you say to me can and will be used against you in a court of law; you also have a right to an attorney and to have him here present during the questioning if you wish. You also have a right to answer my questions without an attorney, and if you decide to answer

BLEED THROUGH

the questions without an attorney you can stop the questioning at any time. Do you understand this? He replied with a nod.

Q. And that's what he did, he replied with a nod? A. Yes."

Agent Maxwell further testified at pp. 68-69:

"A. I questioned him immediately after I advised him of his rights.

Q. In the Gas Station? A. Yes.

Q. What questions did you ask him at that time? A. The reason I was so implicit, I found the money which I knew was passed to him by an agent; when I found the money I was going to ask him questions regarding the money. Explaining his rights I said, 'What is this money for'? He said, 'It's for gas'.

Q. And this was in the Gas Station, not in the car? A. Yes.

Q. What else did you question him about? A. I said, 'Why do you have this money separated from the money in your wallet'? He said, "I keep it separated because I have it ready for the gas'.

Q. Anything else? A. And I believe I advised him of his rights. I said, 'Benny, you realize'—

Q. You asked him two or three questions and you advised him of his rights? A. Yes.

Q. This was in the Gas Station? A. Yes.

Q. He didn't understand you the first time? A. I wanted to make it implicit to him to tell me the truth, which I knew was a lie at the time.

Q. You went through the whole thing again? A. I said, 'You are advised of your rights. What's this money for'?"

Agent Thomas Smith, who drove the Government car for Agent Maxwell, testified that his assignment was to

transport the seized merchandise from the Gas Station to the Government office. After receiving the communication to make an arrest he arrived at the scene in a matter of seconds (T-35).

He could not remember if he was in the immediate area when Agent Maxwell questioned petitioner but he recalls exiting the car, walking to the station wagon, looking for a weapon or things of that nature. He then stood at the rear of the station wagon awaiting instructions from Agent Thornton and Agent Maxwell. As he walked around the station wagon he heard Thornton give Schifter part of the *Miranda* warnings. He never heard Maxwell give any warnings. At the time Giordano was handcuffed near the station wagon (H. 38-41).*

Sergeant Richard Gregory, New York City Police Department, testified that while in the Government car with Agent Thornton, Agent Maxwell told them to move in to make the arrest. In less than a minute Agent Maxwell arrived. He and Thornton had arrested Schifter. He heard Thornton give *Miranda* warnings to Schifter. At this time, Giordano, equipped with a transmitter was a few feet away and should have heard this conversation, according to Police Sergeant Gregory. He, Gregory, testified that Agent Maxwell was not present when Agent Thornton was giving the *Miranda* warnings. He also maintained, "at least of the KCL was on he could hear it, and it would be recorded, and the other people in the car (Kopeski and Grattan) would have heard it also" (17-18).

Agent Frank Kopeski testified that he was in the Government car with Agent Grattan. They had a KCL

---

* "H." refers to pages of Stenographer's Minutes dated November 21, 1975, at the reopening of Suppression Hearing.

BLEED THROUGH

in the car which was monitored by Grattan. While he was able to hear the Giordano-Schifter conversation at no time did he hear Agent Thornton or Agent Maxwell or anyone else give *Miranda* warnings (5-15). Agent Kopeski placed the burden upon Agent Grattan. According to Kopeski it was Grattan's responsibility to monitor and record (11). Agent Grattan did not testify.

Undercover Agent Joseph Giordano testified that he gave defendant Schifter $1,000 in the office of the Gas Station. He and Schifter then went outside to Schifter's station wagon to look at the merchandise he had just purchased. He had seen only one camera lens when he and Schifter were placed under arrest. Although he was in the presence of Schifter and Agent Thornton for almost two minutes he did not hear any *Miranda* warnings given (80-90).

The Government's transcript of the taped conversation reflects the following:

"Who are these guys?
I don't know.
I don't know either.
Yes sir, what can we do for you?
All right fellas, Federal Agents—put your hands over the top of the car.
Take it easy!
What's this about?
Look, I'm here to get my car serviced.
You a regular customer here?
I come here occasionally, I'm around the area, I stop here, you know.
What's your name?
Ah, Shifter.
I am with the Treasury Department, Customs at the Airport.
You got a pair of cuffs, Dick?
Yeah, Tommy's got them.

I want to talk to you a minute.
I am taking this prisoner here.
What about my cars?
Don't worry about your car. Where are the keys to it?
It's in the car, I believe.
Alright.
I think I left them in the car.
Which one is yours?
The Cadillac.
Put them out.
What's your name again?
Just sit in the back.
Wait till you hear ———
Who are these guys, I don't know who they are.
I am on tape or something.
Keys are in the car, Tom.
Ah.
Did he say where Charlie?
He's got to speak to the guy."

From all of the conflicting testimony it is obvious that the best evidence is the tape recorder and the Government's transcribed version of the tape which conclusively demonstrates that no *Miranda* warning(s) were, in fact, given. According to the recorded conversations neither Agents Thornton nor Maxwell gave *Miranda* warnings at the time they said they had. The Government's transcribed version supports this thesis.

The Court was clearly erroneous in relying upon Agent Thornton's and Agent Maxwell's conflicting testimony. (See, pp. 3-27 of the December 5, 1975 hearing.)

The conflicting testimony of the agents concerning the initial two minute period of Schifter's arrest is almost perjurious on its face. This case falls within the rationale of *United States* v. *Marshall*, 488 F.2d 1169 (9th Cir. 1974) at p. 1171 and at footnote 1.

BLEED THROUGH

III.

The Arrest Of The Petitioner, Schifter, And The Search And Seizure Of The Merchandise In The Station Wagon Was Without Probable Cause

As indicated above, undercover Agent Giordano and petitioner Schifter's conversations were electronically recorded. Thereafter, the Government transcribed the tapes in the form of prepared transcripts. Through the interaction of the Government's transcripts of Giordano and Schifter's electronically recorded conversations and the testimony of the Agents, we endeavor to demonstrate that there was no probable cause for Schifter's arrest thus invalidating the seizure of the merchandise which forms the basis for petitioner's conviction.

Undercover Agent Giordano testified that he gave petitioner Schifter $1,000 in the office of Schifter's Service Station prior to his viewing the merchandise that he was purchasing and which was allegedly in Schifter's station wagon parked in the gas station (83-84).

Giordano and Schifter walked to the station wagon where Giordano observed one lens amongst a box full of lenses. Schifter was purportedly showing Giordano some items characterized as accessories when the Government Agents arrived and arrested Giordano and Schifter pursuant to a signal (84).

According to Giordano there was a pre-arranged signal that after the merchandise was purchased and received then Schifter was to be arrested (82-83).

Since Giordano did not arrest Schifter the issue of probable cause must come from the information that the other Government agents had to arrest and seize.

Agent Thornton was on stationary surveillance in a Government car "considering" Flatlands Avenue running East and West, (he) had been a couple of blocks South, towards the Belt Parkway. From such location he could not observe petitioner Schifter's gas station (4).

When being cross-examined Agent Thornton admitted that he moved in for the arrest when the money exchanged hands. The following testimony was adduced at p. 19:

> "Q. Did you know whether or not Detective Giordano had actually seen the lenses prior to the time he negotiated the sale? A. As far as I am aware he did see the lenses.
>
> Q. How did you know that? A. By his comments afterwards.
>
> Q. What were his comments, specifically? A. Specifically, I'm not sure but I was the case agent, I had to interview him after the matter was finalized and everything was over that day, and he indicated to me that he had looked at the merchandise before agreeing to purchase it, and he knew how many lenses he was going to buy."

Agent Thornton, by his testimony, admitted that Giordano never said at the time of arrest or even later that day that Giordano knew that the lenses he saw were stolen. As a matter of fact neither did Agent Thornton at the time of arrest (20-24).

Agent Maxwell testified that he heard over the Government's car radio the prearranged signal to make the arrest. He personally heard no conversation between Giordano and Schifter. He neither saw nor heard the transfer of the money or sale (52-54).

At the conclusion of the hearing the Court ruled " * * * the tapes show, coupled together with the testimony of this last witness (Giordano), they knew a crime

BLEED THROUGH

had been committed". Thereafter, the Court allowed the suppression hearing to be re-opened.

Agent Gregory, who was with Agent Thornton in a nearby automobile, said Agent Maxwell advised them to make an arrest. The words used were "Move in . . . the money has been passed" (H. 17).

Agent Smith, who was Agent Maxwell's car-partner, received a communication to move, to make an arrest—he did not relate this to anyone (H. 34-35).

Agent Kopeski testified that Agent Grattan and he were listening to the conversation between Giordano and Schifter, then the following was said at (H. pp. 6-7):

> "Q. Now, there came a time when the agents were told to move in to make the arrest, is that correct? A. Yes.
>
> Q. And who gave that direction? A. It came over the radio. I don't know who exactly the officer was. I cannot recall.
>
> Q. Well, the one who gave the instruction, was he also the one who was listening to the KCL? A. No, that is not the case.
>
> Q. Somebody gave the instruction? A. Yes, I believe so.
>
> Q. And that party wasn't privy to the KCL, am I correct? A. No.
>
> Q. And do you know what motivated that party to give the instruction to move in? Was he told something by you or by Grattan, or did he make his own independent judgment at that time? A. I do not recall.
>
> Q. Do you recall whether either yourself or Grattan had conveyed information to the party who ordered the arrest? A. I do recall at one instance during the conversation when the money count was going down that Agent Grattan came

over the radio and notified the rest of the parties involved, stating that the money was going down, the money count was going down."

Agent Grattan was never called as a witness. However, his partner said it was someone else other than Agent Grattan who issued the order to make the arrest.

The transcript of the tape and Giordano's testimony clearly manifests that Giordano was unaware that the lenses were in fact stolen. It is undisputed that neither Agents Smith, Maxwell, Thornton and Gregory knew with any degree of certainty that the merchandise was stolen.

Upon the authority of *Whiteley* v. *Warden*, 401 U.S. 560 (1971) it is evident that petitioner's motion to suppress was erroneously decided by the court below.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued to review the Judgment of the Court below.

Respectfully submitted,

THEODORE ROSENBERG,
Attorney for Petitioner
Bernard Schifter,
125 Schermerhorn Street,
Brooklyn, New York 11201.
Telephone: 858-0589

Of Counsel
HERBERT J. KIMMEL

BLEED THROUGH

APPENDIX A—Order Affirming Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-six day of February one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges,

75-1415

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

BERNARD SCHIFTER,
Petitioner.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
VINCENT A. CARLIN
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1367

BERNARD SCHIFTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1976. The petition for a writ of certiorari was filed on March 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest and for the subsequent seizure of stolen goods from his automobile.

2. Whether the evidence supports the district court's ruling that petitioner was advised of his rights under *Miranda* v. *Arizona* prior to making any post-arrest statements.

3. Whether the district court's instruction to the jury on the voluntariness of petitioner's post-arrest statements complied with 18 U.S.C. 3501.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of unlawfully possessing and transporting a quantity of stolen camera lenses and accessories, in violation of 18 U.S.C. 549 and 659. He was sentenced to concurrent terms of two years' imprisonment on one count and ten years' imprisonment on the other, subject to study and report under 18 U.S.C. 4208(b) and (c). He was also fined $10,000. The court of appeals affirmed (Pet. App.).

1. On August 8, 1974, a shortage of nineteen cartons of imported cameras, lenses and accessories was discovered at John F. Kennedy Airport in Queens, New York. This merchandise was valued at approximately $27,816 (Tr. 133-138, 141-144).

In September 1974, petitioner informed August Zolfo that he had some camera lenses and asked if Zolfo could "handle" them in his store (Tr. 152). Zolfo said that he would first have to see the lenses and have some of his friends look them over. On the next day, petitioner provided Zolfo with one of the lenses for his inspection (Tr. 151-157).

On September 19, 1974, United States Customs agents met with Zolfo and determined through an investigation of a list of the serial numbers of the lenses stolen from Kennedy Airport that the lens provided by petitioner to Zolfo was part of that shipment. After being informed of this, Zolfo cooperated with the authorities and called petitioner in order to arrange a purchase of the remaining lenses. With Thornton listening to the conversation over an extension telephone, Zolfo asked petitioner if "[he] had any

BLEED THROUGH

additional lenses at that time" (Tr. 246). Petitioner said he did, and Zolfo then made arrangements with petitioner to have his friend purchase the lenses the next day at petitioner's gas station in Brooklyn (Tr. 38-42, 80-81, 154-160, 245-248).

The next day, Joseph Giordano, a detective with the New York Port Authority Police, who was working in an undercover capacity, met with petitioner in the office of the gas station. Giordano was equipped with a body recorder and transmitting device to enable other agents, who were conducting surveillance, to know when the sale was made. Giordano and petitioner negotiated the sale of twenty-one lenses for $1,000, which Giordano paid petitioner in one hundred dollar bills. They then proceeded to petitioner's station wagon, which was parked nearby, and Giordano observed two boxes in the rear of the car. One box had a visible camera lens in it; petitioner also showed Giordano a box of camera accessories and stated that "[w]e have 400 cameras, too" (Tr. 82-87, 101, 104-106, 161-164). The surveilling agents, having received a prearranged signal indicating that petitioner had been paid the money, then arrested petitioner (*e.g.*, Tr. 4-5, 17-18, 52-54, 82-84, 191-192; November 21, 1975 Tr. 5-7, 17-19, 34-37).[1]

Agent Thornton, who arrested petitioner, testified that when he arrived at the gas station he observed petitioner and Giordano standing together at the rear of petitioner's car, which had two large containers in it (Tr. 5-8, 17-21). After Thornton advised petitioner of his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436, petitioner was searched by Customs Agent Thomas Maxwell. The $1,000 given to petitioner by Giordano was found in peti-

---

[1]"November 21, 1975 Tr." refers to the re-opened suppression hearing commenced on that date.

tioner's pocket. After being readvised of his rights by Maxwell, petitioner stated that the $1,000 was for "gas money" (*e.g.*, Tr. 10-12, 48, 56-70, 178-179, 251; November 21, 1975 Tr. 30). Subsequently, petitioner was once more advised of his rights by both Thornton and Maxwell, and in response to questions by the agents regarding his possible cooperation in the investigation of the stolen merchandise, petitioner stated that if he cooperated "his bones would be spread all over the airport" (*e.g.*, Tr. 15-16, 241-242, 253).

The boxes in the station wagon at the time of petitioner's arrest contained camera lenses and accessories that were part of the stolen shipment (Tr. 277-279).

2. Prior to the commencement of the trial, petitioner moved to suppress his post-arrest statements on the ground that he was not given *Miranda* warnings and to suppress the seized merchandise on the ground, *inter alia*, that there was no probable cause. After a hearing, the district court denied both motions. It stated (Tr. 122):

> I find that Thornton gave [the] defendant an adequate warning when he first apprehended him; and I find that the other warnings, while they certainly helped, that he had been given an adequate warning were unnecessary in the light of the first warning.
>
> Secondly, * * * what search there was took place as an incident to the arrest immediately following the commission of the crime * * *. [T]he tapes show when coupled together with the testimony of this last witness, they did know a crime had been committed.

Prior to the imposition of sentence, the district court allowed petitioner to re-open the suppression hearing to call additional witnesses (see November 21, 1975 Tr. 1-45). Petitioner's renewed motion to suppress was denied

(December 5, 1975 Tr. 27; see *id.* at 15, 19).[2] Petitioner's contention that the court's instruction regarding his admissions had been inadequate also was rejected (December 5, 1975 Tr. 32).

ARGUMENT

1. Petitioner contends (Pet. 21-24) that the agents had insufficient probable cause either to arrest him or to seize the boxes of stolen merchandise from his car. But the record shows the agents had ample cause to do these things. Thornton knew that petitioner had given a lens to Zolfo that was part of the shipment stolen from Kennedy Airport, had agreed with Zolfo on the previous day to sell additional lenses to Zolfo's friend, and had taken $1,000 from Giordano in payment for the lenses. These facts combined to create circumstances "sufficient to warrant a prudent man in believing that [petitioner] had committed or was committing an offense." *Gerstein* v. *Pugh*, 420 U.S. 103, 111-112, quoting from *Beck* v. *Ohio*, 379 U.S. 89, 91.[3] Since petitioner was arrested by the rear of his station wagon, the seizure of the stolen merchandise was proper as incident to the arrest. *E.g.*, *Chimel* v. *California*, 395 U.S. 752, 763. Beyond this, the officers had been aware that the station wagon contained two large cartons and that one of the boxes contained a lens. This independently provided the agents with cause to seize what they reasonably believed was the contraband. Cf. *Texas* v. *White*, 423 U.S. 67; *Chambers* v. *Maroney*, 399 U.S. 42, 48; *Ker* v. *California*, 374 U.S. 23, 42-43.

---

[2]"December 5, 1975 Tr." refers to the re-opened suppression hearing continued on that date.

[3]Petitioner's claim that there was no probable cause is also inconsistent with the position he took during the suppression hearing, at which he argued that a search warrant was required before a search of his car could have been conducted because the agents had probable cause (see Tr. 119, 121).

2. Petitioner contends (Pet. 11-20) that the district court erroneously found that he was advised of his rights under *Miranda*. But the district court, which has the task of weighing the credibility and recollection of witnesses, chose to credit the testimony of four arresting officers who testified that *Miranda* warnings were given prior to petitioner's admissions (Tr. 114, 116-119, 122, 128, 130; December 5, 1975 Tr. 14-22, 26-27). The court's finding must be upheld unless it was clearly erroneous. *E.g., United States* v. *Rosa*, 493 F. 2d 1191, 1193-1194 (C.A. 2), certiorari denied, 419 U.S. 850. There is no need for this Court to review this essentially factual question,[4] which was resolved adversely to petitioner by the court of appeals. See *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 275.

3. Petitioner contends (Pet. 6-10) that the district court's instruction to the jury on the voluntariness of his post-arrest statements did not comply with 18 U.S.C. 3501. Petitioner did not request a specific instruction and did not object to the instruction given by the court; hence, review would be warranted only if there was plain error. See Fed. R. Crim. P. 30, 52(b). There was no error in this case.

---

[4]Petitioner's contrary claim is premised primarily on the fact that a two-minute tape recording of the arrest, which was made from conversations over Giordano's transmitting device, does not include any *Miranda* warnings. However, the evidence showed that Giordano was separated from petitioner after his arrest and that he did not hear any warnings given to petitioner (*e.g.*, Tr. 89-90, 194-200, 257-259, 291-292; November 21, 1975 Tr. 20-23, 32-33). Thus, the court properly determined that the recording device worn by Giordano and the tape, which had "a lot of inaudibility" and "substantial gaps," and which petitioner himself stated was not "too clear" (Tr. 113, 233-234, 237-238), could not have picked up all the conversations following petitioner's arrest (Tr. 114, 127-129; December 5, 1975 Tr. 14-15, 19-20).

The jury was instructed to disregard entirely petitioner's admissions "unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement[s] * * * [were] 'knowingly' made or done * * *. In determining [this], the jury should consider * * * [among other circumstances] [the] physical and mental condition of [petitioner] while in custody or under interrogation, * * * and also all other circumstances in evidence surrounding the making of the statement * * *, including whether [he was given a proper warning of his rights]" (Tr. 346-347). This instruction more than adequately complied with the requirements of 18 U.S.C. 3501.[5] *United States* v. *Barry*, 518 F. 2d 342 (C.A. 2), relied on by petitioner (Pet. 6-10), is beside the point. *Barry* does not prescribe any specific language that must be included in an instruction under 18 U.S.C. 3501; it merely held that a "standard boilerplate charge on credibility," with no "specific reference to a confession" (518 F. 2d at 347), failed to comply with Section 3501. That holding is not applicable to this case, in which there was a specific instruction regarding petitioner's admissions.

---

[5]Indeed, the instruction actually given goes beyond the requirements of 18 U.S.C. 3501(a) in that it required the jury to find voluntariness beyond a reasonable doubt before it considered the post-arrest statements. Under the statute, there is no such requirement. After the court finds a confession to be voluntary, it

> shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. [18 U.S.C. 3501(a).]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
HOWARD WEINTRAUB,
Attorneys.

MAY 1976.

DOJ-1976-05